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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NAGATA BROTHERS FARMS,

Petitioner,

VS.

THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,

Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Real Party In Interest.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

JOSIAH L. NEEPER
JAMES K. SMITH
NORMAN L. VETTER
JEFFREY M. SHOHET
2100 Union Bank Building
San Diego, California 92101
Telephone: 714/236-1661

Attorneys for Petitioner
NAGATA BROTHERS FARMS

OF COUNSEL:
GRAY, CARY, AMES & FRYE
FEIST, VETTER, KNAUF & LOY

PANDICK PRESS, WEST COAST, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

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The petitioner, NAGATA BROTHERS FARMS, respectfully prays that a writ of certiorari issue to review the California Supreme Court's denial of a hearing to review the decision and order of the Agricultural Labor Relations Board, State of California, filed in this proceeding on May 23, 1979.

DECISIONS AND ORDERS BELOW

The unreported decision of the Administrative Law Officer of the Agricultural Labor Relations Board, State of California, appears in the separately presented Appendices as Appendix A.

The reported decision and order of the Agricultural Labor Relations Board, which is officially reported at 5 ALRB No. 39 (1979), is Appendix B. The order of the Court of Appeal summarily denying a petition for review is Appendix D. The order of the California Supreme Court denying a petition for hearing is Appendix F.

JURISDICTION

The opinion of the Administrative Law Officer, Appendix A, was filed with the Agricultural Labor Relations Board on May 9, 1978. The decision and order of the Agricultural Labor Relations Board, Appendix B, was filed on May 23, 1979. A timely[1] petition for review before the California Court of Appeal was filed by petitioner on June 21, 1979, as evidenced by Appendix C. The Court of Appeal's order denying the petition for review was filed November 16, 1979, as evidenced by Appendix D. A timely[2] petition for hearing before the Supreme Court of California was filed by petitioner on November 26, 1979, as evidenced by Appendix E. The Supreme Court's order denying a hearing was dated December 13, 1979 as evidenced by Appendix F. This petition for certiorari was filed within ninety days of December 13, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether employees who reside on an employer's private property without permission have a First Amendment right which requires the employer to grant union organizers unfettered vehicular access to his property.

[1] Within 30 days after the filing of the decision of the ALRB. (California Labor Code Section 1160.8).

[2] Within 10 days from the filing of the decision of the Court of Appeal. (California Rules of Court 28(b)).

2. Whether the California procedure for review of Agricultural Labor Relations Board decisions which permits a petition for review to be summarily denied, without statement of reasons or full consideration of its merit, is an unconstitutional denial of due process.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 22, 1977, the UNITED FARM WORKERS served upon petitioner a Notice of Intent to Obtain Access[3] to petitioner's fields known in these proceedings as the Wilshire

[3] G.C. Exh. "1G." The notice and negotiations were pursuant to Agricultural Labor Relations Board Regulations, Title 8 Cal. Admin. Code § 20900.

Ranch (hereinafter the "Ranch"). Scott Washburn, a UFW organizer, delivered the Notice to Harry Nagata at petitioner's business office on the morning of November 22, 1977. At that time, a conversation took place between Washburn and George and Harry Nagata.[4] During the conversation, Washburn informed petitioner that the UFW was intending to "take access"[5] and either threatened or predicted that the UFW would be filing charges against petitioner with respect to access.[6]

The following day, on November 23, attorneys for petitioner and other growers in the area that had received UFW Access Notices met with Marc Roberts, the Regional Director for the Board, and Washburn to negotiate an access agreement.[7] During the meeting, Washburn was informed that petitioner's agricultural employees got to work at approximately 6:30 a.m., had lunch breaks from 11:00 a.m. to 11:30 a.m., with a second shift from 11:30 a.m. to 12:00 noon, and work was completed at either 3:00 p.m. or 3:30 p.m.[8]

During the November 23 meeting, petitioner agreed that UFW organizers could enter the Ranch in their cars beginning at 5:30 a.m. with a foreman escort. The UFW organizers would be allowed to remain until the crew started work, at which time the foreman would escort the UFW representative out of the fields.[9]

Petitioner proposed that UFW access commence shortly before 11:00 a.m. when the catering truck arrived. The catering company had its own lock to the vehicular access gate; the Petitioner's proposal was that the caterers would open the gate and UFW organizers, if they chose to enter by car, would drive in behind the catering truck while the crews ate their lunch.[10]

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[4] R.T., Vol. III, p. 106, l.6-p. 107, l.7; Vol. IV, p. 19, l.15-p. 20, l.12.

[5] R.T., Vol. III, p. 108, l.11-18.

[6] R.T., Vol. III, p. 109, l.5-6; Vol. IV, p. 20, l.19-21.

[7] R.T., Vol. V, p. 60, l.12-p. 61, l.21.

[8] R.T., Vol. III, p. 62, l.24-p. 63, l.10.

[9] R.T., Vol. III, p. 63, l.19-p. 64, l.24.

[10] R.T., Vol. III, p. 65, l.23-p. 66, l.15.

Petitioner expressed concern regarding the damage that could be caused by UFW organizers' vehicles if operated in the fields at too great a speed; it is for this reason that petitioner required the catering truck escort. Since the catering truck would probably leave the Ranch before the end of the lunch periods, petitioner proposed that the foreman escort the UFW organizers out of the Ranch shortly after 12:00 noon. The UFW did not raise any objections to petitioner's proposals at the November 23 meeting.[11]

Due to the prolonged discussions, the meeting ended before any meaningful discussion could be had concerning the mechanics of UFW access after working hours.[12] However, petitioner was prepared to agree to vehicular access for one hour after work procedurally comparable to its proposals with respect to access before work and during the lunch hour. At the conclusion of the meeting, it was understood that ALRB Regional Director Roberts would meet with the UFW and then get back to petitioner and the other growers to schedule a subsequent meeting at which time the remainder of the access agreements would be worked out.[13] These discussions were intended to lead to a written access agreement; however, no such agreement was reached prior to the UFW's attempt to take access on November 26, 1977.

On November 26, 1977, Washburn and several of the UFW representatives drove to the Ranch at 4:30 p.m.[14] The intent of the UFW organizers was to obtain access to the Ranch and speak with petitioner's employees who stopped work at 3:00 p.m. that day.[15] Washburn also testified that the purpose of their visit was to attempt to talk with employees that he believed lived one and one-half miles from the vehicular gate off Wilshire Road.[16]

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[11] R.T., Vol. III, p. 65, l.23-p. 67, l.1.

[12] R.T., Vol. III, p. 67, l.4-11.

[13] R.T., Vol. III, p. 67, l.12-17.

[14] R.T., Vol. I, p. 16, l.11-p. 17, l.12.

[15] G.C. Exhs. "7" and "8."

[16] R.T., Vol. I, p. 61, l.1-8.

The point at which Washburn and his fellow organizers considered entering the Ranch is a vehicular gate a few hundred yards north of the end of Wilshire Road. A single chain approximately eighteen inches off the ground prevents vehicles from entering the Ranch at this point. No obstructions were present, nor have obstructions ever been present, that would prevent any individual from walking onto the Ranch.[17] All points on the Ranch can be reached by a walk of fifteen minutes or less from the Wilshire Road vehicular access, and most points on the Ranch can be walked to in less than five minutes. Washburn acknowledged that he could have merely stepped over the chain and walked onto the property.[18] Inded, Washburn considered whether he and his fellow organizers would walk onto the Ranch; instead they decided to proceed to petitioner's business office.[19]

Washburn and the UFW organizers accompanying him arrived at petitioner's office at approximately 4:15 p.m. that same afternoon.[20] Washburn demanded that the UFW be given keys to the chain across the Wilshire vehicular entrance or that Harry Nagata go to the vehicular entrance and unlock it so that the organizers could enter the Ranch in their vehicle. Harry Nagata responded that it was more than one hour after petitioner's crews had ceased working. Washburn acknowledged this fact but asserted that the UFW was entitled to drive onto the Ranch at any time of the day or night because of the UFW's belief there were workers living in, on, or near the Ranch. Harry Nagata answered that he did not maintain a labor camp and that he knew of no employees then living on the Ranch.[21] Nonetheless, Harry Nagata further responded that he would check with his attorneys to determine whether Washburn's legal position was correct. Harry Nagata at-

[17] R.T., Vol. I, p. 58, 11.6-18.
[18] R.T., Vol. I, p. 57, 1.24-p. 58, 1.18.
[19] R.T., Vol. I, p. 58, 11.19-25.
[20] R.T., Vol. IV, p. 21, 11.2-8.
[21] R.T., Vol. I, p. 20, 11.1-17; Vol. II, p. 131, 1.13-p. 132, 1.8.

tempted to contact his lawyer, but at 5:00 p.m. on a Saturday night was unable to do so.[22] Washburn and the other UFW organizers left without being given a key to the Wilshire vehicular entrance, and they did not make any further attempts to walk onto the Ranch on that Saturday. Since that Saturday, the UFW has never attempted to take access to any fields farmed by petitioner either one hour before work, during the lunch break, one hour after work or at any other time.

The Administrative Law Officer found that there had been no violation of regulation access as required by the California Administrative Code.[23] Nonetheless, she concluded that petitioner's denial of vehicular access on November 26, 1977 constituted an unfair labor practice. Specifically she found that petitioner had denied UFW organizers vehicular access to workers' homes, thereby denying what she found to be a constitutional right of access guaranteed by the First Amendment of the United States Constitution.[24]

The evidence upon which the Administrative Law Officer found that employees lived on the Ranch established that persons might be living in the area of the Ranch but did not identify whether the persons were employees of petitioner, unemployed, or workers for the Ranch. Most of the testimony at the hearing was that in previous years, although no persons were actually seen living upon the Ranch, witnesses had noticed garbage and temporary tent-like structures.[25] In fact, Washburn, the leader of the UFW representatives seeking access on November 26, 1977 expressly stated that he had not seen any evidence of any persons living on the Ranch in 1977.[26] Assuming there were persons living on or near petitioner's Ranch, these persons were there without permission. Petitioner

[22] R.T., Vol. I, p. 20, 1.1-p. 21, 1.9; Vol. III, p. 22, 11.1-20.
[23] Administrative Law Officer's Decision, p. 12.
[24] Administrative Law Officer's Decision, pp. 16-22.
[25] R.T., Vol. II, p. 69, 11.7-9; R.T., Vol. II, p. 110, 11.8-10.
[26] R.T., Vol. I, p. 62, 1.14-p. 63, 1.4.

discouraged persons from living on the Ranch, and physically removed any materials found on the Ranch that might conceivably be used as housing.[27]

Nonetheless, the Administrative Law Officer found that petitioner had denied UFW organizers their constitutional right of access to the Wilshire Ranch on November 26, 1977. On May 23, 1979, the ALRB affirmed the rulings, findings and conclusions of the Administrative Law Officer and adopted a modified form of her recommended order. Petitioner petitioned for review of the Board's decision and order with the California Court of Appeal, Fourth Appellate District, Division One, within thirty days from the date of issuance of the Board's order. Briefs were filed shortly thereafter, with petitioner's reply brief being filed November 15, 1979. One day later, November 16, 1979, the Court of Appeal summarily denied the petition for review: "The petition for review of an order of the Agricultural Labor Relations Board is denied." Petitioner then filed a petition for hearing with the California Supreme Court. This request was summarily denied by a postcard stamped "Hearing Denied" on December 13, 1979.

REASONS FOR GRANTING THE WRIT

I. First Question Presented.

This case involves a peculiar blend of the access doctrine espoused in *National Labor Rel. Bd.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and its progeny.

In *Babcock* this Court held that if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union access to communicate with them, the employer must allow the union to approach his employees on his property. 351 U.S. at 113. The employer's right to exclude persons from his property was required to yield

[27] R.T., Vol. III, p. 127, 11.12-14.

only to the extent needed to permit communication of information on the right to organize. Petitioner in this case accommodated the union's right to access in this regard by permitting union organizers to come onto its property before work, during lunch breaks, and after work.

The union now claims that both it and employees allegedly living on petitioner's property have an additional First Amendment right which requires the employer to give the union unrestricted vehicular access to these employees.

The Agricultural Labor Relations Board upheld this constitutional right to access to these employees based primarily on the California Supreme Court decision in *United Farm Workers of America* v. *Superior Court*, 14 Cal.3d 902 (1975), in which the court indicated that a First Amendment right to access would apply to labor camps.[28] The basis of this First Amendment privilege can be traced to *Marsh* v. *Alabama*, *supra*, and other "company town" decisions.[29]

Even if the analogy between labor camps and company towns is appropriate, it cannot be properly applied to the facts in this case. This Court has long recognized that before an owner of private property can be subjected to the commands of

[28] The *United Farm Workers* decision is dicta to the extent it discusses a First Amendment Right of access to migrant labor camps. The court states "We are not required to resolve . . . the thorny problem of whether the injunction here in issue is itself justified, i.e., whether its substance comports with the requirements of the First Amendment. We determine only whether the challenged ex parte order affects, or in the words of *Carroll*, is in the area of activity protected by the First Amendment." 14 Cal.3d at 911. *See also*, *Note, The Supreme Court of California 1974-1975*, 64 Calif. L. Rev. 239, 373-74 n23.

[29] The *United Farm Workers* decision cites to certain federal cases and joins in their reading of the First Amendment. 14 Cal.3d at 910. These federal cases focus on *Marsh* v. *Alabama*, and other "company town" cases. *E.g.*, *Petersen* v. *Talisman Sugar Corporation*, 478 F.2d 73, 80-81 (5th Cir. 1973).

the First and Fourteenth Amendments, the privately owned property must assume to some significant degree the functional attributes of public property. *Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 539 (1972). Where, as here, the employer has not consented to employees residing on his property, and has taken steps to prevent persons from doing so, no state action exists.

Even if state action existed, the First Amendment does not operate in a vacuum requiring unrestrained access. The United States Court of Appeal for the Fifth District has indicated that even though a labor camp's residents and their visitors have a constitutional right of access, property owners can nonetheless impose reasonable restrictions designed to prevent unnecessary interference with their business. *Petersen* v. *Talisman Sugar Corporation*, 478 F.2d 73 (5th Cir. 1973). Petitioner was, and is, willing to permit vehicular access upon notice, and has never interfered with access by foot. The UFW has asserted, and the Board's order grants the UFW, a right to drive upon petitioner's property at will unrestricted by petitioner in any way.

A ruling on this question is necessary to preserve the delicate balance struck by this Court between First Amendment rights of employees and private property rights of employers.

II. Second Question Presented.

Petitioner was unable to obtain meaningful judicial review under the California procedure for review of Agricultural Labor Relations Board decisions. California Labor Code Section 1160.8 provides that persons aggrieved by the final order of the ALRB "may obtain a review of such order in the Court of Appeal . . . by filing in such court a written petition requesting that the order of the Board be modified or set aside."

The California Supreme Court has recently determined that judicial review of ALRB decisions is akin to a petition for writ of review or mandamus and therefore petitions for review

may be summarily denied, without statement of reasons, "on the face of the petition and any memorandum opposing it." *Tex-Cal Management, Inc.* v. *Agricultural Labor Relations Board*, 24 Cal.3d 335, 350 (1979). The *Tex-Cal* opinion also suggests that the court has discretion to deny a petition for review without full consideration of the merits.[30] Petitioner's petition for review in the California Court of Appeal was accorded this summary treatment: it was denied one day after petitioner's reply brief was filed. Petitioner's petition for hearing filed with the California Supreme Court was also summarily denied.

A fundamental principle in administrative law is that access to judicial review of agency decisions must be provided absent persuasive or clear and convincing evidence of a contrary legislative intent. *Morris* v. *Gressette*, 432 U.S. 491 (1977); *Abbot Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Although "access" to judicial review is technically provided under the California Labor Code and the *Tex-Cal* opinion, the type of review under *Tex-Cal* is perfunctory at best and nonexistent as a practical matter in this case. Clearly due process requires more than a summary denial the day after briefs are filed.

By way of contrast, review from National Labor Relations Board orders is commenced by filing a petition for review in the Court of Appeal. Once the petitioner files the record, the parties file briefs, present oral argument in many cases and receive a decision on the merits from the court. Federal Rules of Appellate Procedure 20. *See also Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Board*, 24 Cal.3d at 348.

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[30] "The absence from the federal scheme of judicial discretion to deny a petition for review without full consideration of the merits suggests the possibility that section 1160.8 review also is a matter of right. . . ." *Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Board*, 24 Cal.3d 335, 348-49 (1979). The court in *Tex-Cal* later concludes that section 1160.8 does not so provide.

The extent of judicial review required of administrative agency decisions is not clear. However, the purpose of such judicial review is to insure that the petitioning party has been accorded due process in the administrative proceedings. *Lewes Dairy, Inc.* v. *Freeman*, 401 F.2d 308, 317 (3d Cir.), *cert. denied* 394 U.S. 929 (1969). Further, judicial review should be undertaken with careful and deliberate scrutiny of an agency's decisions to insure compliance with law and legislative mandate. *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-16 (1971); *Office of Communication of United Church of Christ* v. *F.C.C.*, 465 F.2d 519 (D.C. Cir. 1972). Petitioner contends that the California procedure for review of ALRB decisions fails to provide this assurance.

A ruling on this question is necessary to insure that meaningful judicial review of Agricultural Labor Relations Board determinations is available.

CONCLUSION

This Court has never determined that the First Amendment requires an employer to grant unfettered access to his private property to union organizers. The decision of the Agricultural Labor Relations Board in California grants this unfettered access so long as the union can establish minimal evidence that persons who may be employees may be living on or near the employer's property. This decision is clearly in conflict with the established parameters of First Amendment rights accorded in both the labor organization context and in the "company town" context. The refusal of the California Supreme Court to review the ALRB decision was clearly in error. Additionally, the California procedure for review of Agricultural Labor Relations Board decisions fails to accord a meaningful judicial review of agency determinations. For both these reasons petitioner requests that this Court grant this petition for writ of certiorari.

Respectfully submitted,

By:

JOSIAH L. NEEPER
JAMES K. SMITH
NORMAN L. VETTER
JEFFREY M. SHOHET
Attorneys for Petitioner
NAGATA BROTHERS FARMS

Of Counsel:
GRAY, CARY, AMES & FRYE
2100 Union Bank Building
San Diego, California 92101
Telephone: 714/236-1661

FEIST, VETTER, KNAUF & LOY
810 Mission Blvd.
Suite 300
Oceanside, California 92054
Telephone: 714/722-1914